



MAIL STOP RCE
PATENT
2001-1088

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of

Jeffrey Ray STOUT et al. Conf. 5103

Application No. 09/769,245 Group 1616

Filed January 26, 2001 Examiner F. Choi

COMPOSITION CONTAINING CREATINE
AND PHOSPHORUS

SUBMISSION PURSUANT TO 37 CFR §1.114

Assistant Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

The present paper responds to the Official Action of July 2, 2003, and constitutes the requisite submission under Rule 114(c) to accompany the Request for Continued Examination filed simultaneously herewith.

In the Official Action of July 2, 2003, the only issue raised with respect to the pending claims 1-26 was the rejection of those claims under 35 USC §103(a) as allegedly being unpatentable over SIMONE U.S. Patent No. 5,397,786, in view of the series of seven secondary references set forth on page 2 of the Official Action, and further in view of KROTZER U.S. Patent Application Publication 2001/0008641. That rejection is respectfully traversed, for the following reasons.

As discussed in detail at pages 3-6 of the amendment filed October 3, 2002, SIMONE fails to teach a composition containing a phosphorus supplement in the amount required by the independent claims 1 and 18-20 - instead, the maximum amount conceivably contemplated by SIMONE is much lower than the minimum amount of phosphorus required by present claims 1 and 18-20.

KROTZER is relied upon in combination with SIMONE as allegedly providing motivation to increase the phosphorus content of the SIMONE beverage to an amount responding to the requirements of present claims 1 and 18-20.

It is respectfully submitted that the proposed combination of SIMONE in view of KROTZER constitutes an impermissible exercise of hindsight, in that, in fact, the skilled artisan would not have been motivated to combine these two references in any manner that would approach the claimed invention, taking into account the teaching of not only these two references, but also the other seven secondary references relied upon in the combination.

In particular, SIMONE is a rehydration drink, particularly suited for administration to people who do heavy work under severe conditions, for example at high temperatures, and to sportspeople and athletes, as well as to patients who exhibit dehydration symptoms due to severe illnesses such as diarrhea or vomiting (see abstract). Column 2, line 9, makes plain that 2,500 mg of at least one electrolyte is the maximum

amount of electrolyte permitted in the SIMONE beverage, which, as discussed previously, corresponds to a phosphorus intake much less than that required by claims 1 and 18-20. Similarly, column 3, lines 18-20 repeat that 2,500 mg of electrolyte is the maximum quantity, with the preferred maximum being 1,000 mg.

Significantly, column 5, lines 37-39 of SIMONE teach that "the specific qualitative and quantitative combination of the components" including the electrolyte, cause the liquid composition to be useful as a rehydration drink.

By contrast, KROTZER relates not to a rehydration drink, but rather to a nutritionally active composition for bodybuilding. See, for example, paragraph [0008] of KROTZER, which characterizes the invention of that reference in its broadest terms as being a composition for accomplishing the delivery of nutritionally beneficial constituents to enhance or facilitate bodybuilding.

Thus, it is unclear in the first instance, and the outstanding Official Action does not address, why one skilled in the art seeking to improve the rehydration drink of SIMONE (which is not described as requiring improvement) would look to the disparate teaching of a bodybuilding nutritional supplement for any useful guidance in that regard.

Moreover, were one skilled in the art to consider these two references in combination, a point that applicants dispute, there is absolutely no teaching or suggestion in either of these

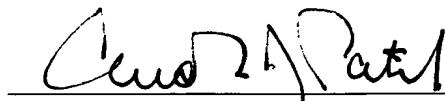
references that would have led the skilled artisan to selectively modify the rehydration drink of SIMONE so as to increase the phosphorus content per KROTZER, while selectively ignoring the teaching of KROTZER in all other relevant respects.

As the remaining seven secondary references relied upon in combination are not purported to teach a modification of SIMONE leading to a phosphorus content in the range required by present claim 1, it is believed to be apparent that the above discussion of SIMONE and KROTZER is sufficient to demonstrate the impropriety of the proposed combination of references on which the obviousness rejection of claims 1-26 is based.

In view of the above discussion, therefore, it is believed that the rejection of claims 1-26 for alleged obviousness cannot properly be maintained. Favorable reconsideration and withdrawal of the same is accordingly respectfully requested.

Respectfully submitted,

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